Office-Supreme Court, U.S.
FILED
JUL 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1259

IN THE

Supreme Court of the United States

October Term, 1984

THE DOW CHEMICAL COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
BY AND THROUGH ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

JANE M. GOOTEE, Esq.
Counsel of Record

JAMES H. HANES, Esq.
BERND W. SANDT, Esq.
THE DOW CHEMICAL COMPANY
1111 Washington Street
Midland, Michigan 48674
(517) 636-2663

Counsel for Petitioner

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I.

IS A HIGHLY SECURED YET OPEN-AIR MANUFACTURING FACILITY AN "OPEN FIELD" WITH NO FOURTH AMENDMENT PROTECTION IN THE MINUTE DETAILS OF ITS COMPLEX PLANT FROM THE GOVERNMENT'S INTRUSIVE, VISUALLY AIDED AERIAL SURVEILLANCE?

II.

DOES SUBSECTION 114(a) OF THE CLEAN AIR ACT AUTHORIZE THE ENVIRONMENTAL PROTECTION AGENCY TO UTILIZE AERIAL PHOTOGRAPHY AS A SITE INSPECTION TECHNIQUE?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
I. THE DOW MIDLAND, MICHIGAN PLANT	5
II. EPA's SEPTEMBER 1977 ON-SITE INSPECTION, REPETITIVE INSPECTION REQUEST, AND DETAILED AERIAL PHOTOGRAPHY	10
III. LOWER COURTS' OPINIONS	13
SUMMARY OF THE ARGUMENTS	15
ARGUMENTS	18
I. EPA's INTRUSIVE AERIAL PHOTOGRAPHY WAS A SEARCH.	19
A. A Secured, Developed Industrial Facility Is Not An Open Field.	19
B. The Open Fields Doctrine Has No Application To Cases Where Sophisticated, Intrusive Surveillance Devices Are Employed.	24
C. EPA's Intrusion Infringed Upon The Personal And Societal Values Protected By The Fourth Amendment.	27

Page

II. THE INTRUSIVE AERIAL PHOTOGRAPHY VIOLATED DOW'S ACTUAL AND REASONABLE EXPECTATION OF PRIVACY. 31

A. Dow's Reasonable Expectation Of Privacy 32

B. Mischaracterization Of "Interior Regions Of The Plant" And "Mere Aerial Observation" 35

C. The Search Was Unreasonable. 39

III. SECTION 114(a) OF THE CLEAN AIR ACT DOES NOT AUTHORIZE, EITHER EXPLICITLY OR BY LACK OF PROHIBITION, THE USE OF AERIAL PHOTOGRAPHY AS A SITE INSPECTION TECHNIQUE. 41

A. The Decision Is Inconsistent With Both The Plain Meaning Of The Statutory Language And Congressional Intent. 42

B. The Court Of Appeals Cites No Legal Authority For Its Holding That The Language Of The Act Does Not Foreclose Use Of Aerial Photography As An Investigation Technique. 45

C. The Decision Is Inconsistent With The Clean Air Act's Provision Protecting Trade Secrets And With Existing Tort And Criminal Law. 47

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES:

Air Pollution Variance Board v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) . . . 15, 18, 22, 24, 26, 37

Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 18

Berger v. *New York*, 388 U.S. 41 (1967) 25, 46

Boyd v. *United States*, 116 U.S. 616 (1886) 40

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. __, 81 L.Ed.2d 694 (1984) 42, 44

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 42, 44

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) . . 40

Dean v. *Superior Court*, 35 C.A.3d 112, 110 Cal. Rptr. 585 (1973) 30

Delaware v. *Prouse*, 440 U.S. 648 (1979) 41

Donovan v. *Dewey*, 452 U.S. 594 (1981) . . 17, 25, 40, 41

DuPont v. *Christopher*, 431 F.2d 1012 (5th Cir. 1970) 47, 48

Federal Trade Commission v. *Raladam Company*, 283 U.S. 643 (1931) 18, 44

G.M. Leasing Corporation v. *United States*, 429 U.S. 338 (1977) 18

Griswold v. *Connecticut*, 381 U.S. 479 (1965) . . . 49, 50

Hester v. *United States*, 265 U.S. 57 (1924) . . . 15, 19, 21, 22, 24, 25

Page

In the Matter of An Application of the United States for an Order Authorizing Interception Of Oral Communications And Video Surveillance, 513 F.Supp. 421 (1980) 29-30

Katz v. *United States*, 389 U.S. 347 (1967) . . . 16, 18, 20, 24, 25, 27, 33, 40

Ker v. *California*, 374 U.S. 23 (1963) 32

Kewanee Oil Company v. *Bicron Corporation*, 416 U.S. 470 (1974) 23, 47

Marshall v. *Barlow's Inc.*, 436 U.S. 307 (1978) . . . 15, 18, 19, 20, 24, 26

Oliver v. *United States*, — U.S. —, 80 L.Ed.2d 214 (1984) 15, 18, 20, 22, 24

Olmstead v. *United States*, 277 U.S. 438 (1928) . . . 24, 33, 49

Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) . . . 40

See v. *City of Seattle*, 387 U.S. 541 (1967) . . . 15, 18, 19, 20

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920) 15

United States v. *American Trucking Associations, Inc.*, 310 U.S. 534 (1940) 17, 43

United States v. *FMC Corp.*, 428 F.Supp. 615 (W.D.N.Y. 1977) 20, 21

United States v. *Kim*, 415 F.Supp. 1252 (D.Ha. 1976) 16, 25, 27, 28, 29, 37

United States v. *Lace*, 669 F.2d 46 (2nd Cir. 1982), ... 16, 25, 27

United States v. *Oregon*, 366 U.S. 643 (1961) 43

Page

United States v. *Swart*, 679 F.2d 698 (7th Cir. 1982) 20

United States v. *Taborda*, 491 F.Supp. 50 (E.D.N.Y. 1980) 29

United States v. *Taborda*, 635 F.2d 131 (2nd Cir. 1980) 16, 25, 27, 29, 37

Wattenburg v. *United States*, 388 F.2d 853 (9th Cir. 1968) 20

Wolf v. *Colorado*, 338 U.S. 25 (1949) 40

STATUTES:

5 U.S.C. § 552 5

5 U.S.C. § 701 4

18 U.S.C. § 1385 46

18 U.S.C. § 2510 . . . . . 29, 46

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1337 4

28 U.S.C. § 1361 4

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

33 U.S.C. § 1308 (§ 308 Clean Water Act) 44

42 U.S.C. § 7413 26

42 U.S.C. § 7414(a) (§ 114 Clean Air Act) 2, 3, 17, 41, 42, 43, 44, 45

42 U.S.C. § 7414(c) 3, 4, 47

M.C.L. § 750.539 48

Page

M.C.L. § 752.771 48

M.C.L. § 752.772 48

REGULATIONS:

29 C.F.R. § 1903 46

40 C.F.R. § 2.201 *et seq.* 47

UNITED STATES CONSTITUTION:

Fourth Amendment 2, 30, 33, 41

MISCELLANEOUS:

Emerson, NINE JUSTICES IN SEARCH OF A DOCTRINE, 64 Mich. L.R. 219 (1965) 50

EPA, MEMORANDUM ON INSPECTION PROCEDURES, 41 Envir. Rptr. (BNA) 2451 (April 11, 1979) 46

Fried, PRIVACY, 77 Yale L.J. 475 (1968) 50

Grange, VISUAL REMOTE SENSING AND PRIVACY INTERESTS OF THE FOURTH AMENDMENT, 1 Northrop U.L.J. of Aerospace, Energy & Environment 33 (1979) 28

La Fave, SEARCH & SEIZURE § 2.4 (1978) 21

Martin, EPA AND ADMINISTRATIVE INSPECTIONS, 7 Fla. St.L.R. 123 (1979) 25, 26

Restatement of Torts § 757 (1939) 47

S. Rep. No. 92-414, 92nd Cong., 2nd Session, U.S. Code Cong. & Ad. News 3668 44

Uniform Trade Secrets Act 48

No. 84-1259

IN THE

Supreme Court of the United States

October Term, 1984

THE DOW CHEMICAL COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
BY AND THROUGH ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals decided and filed on November 9, 1984 (Petition Appendix A), is reported at 749 F.2d 307. The opinion of the District Court for the Eastern District of Michigan decided and filed April 19, 1982 (Petition Appendix B), is reported at 536 F.Supp. 1355.

JURISDICTION

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit is founded upon 28 U.S.C. § 1254(1).

The opinion of the Court of Appeals (Pet. App. A), was decided and filed on November 9, 1984. A Petition for Rehearing was not filed. The Petition for Writ of Certiorari was filed February 7, 1985, and was granted June 10, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Subsection 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a), provides:

> **Authority of Administrator or authorized representative**
>
> For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines) —

(1) The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials —

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

Subsection 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), provides:

Availability of records, reports, and information to public; disclosure of trade secrets

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by that person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

STATEMENT OF THE CASE

The genesis of this case was EPA's purposeful surreptitious acquisition of aerial reconnaissance photographs of Dow's entire 2,000 acre fenced and secured Midland, Michigan, manufacturing facility for use as evidence in a Clean Air Act enforcement action concerning emissions from Dow's two powerhouses. After learning of the flyover from the EPA contractor, Dow brought this action under 28 U.S.C. § 1331* to preserve its privacy interests and to protect the details, confidential business

---

* Jurisdiction was also based on 28 U.S.C. §§ 1337, 1361, 2201, 2202 and 5 U.S.C. § 701.

information and trade secrets of its open-air operations from public disclosure through the Freedom of Information Act (5 U.S.C. § 552) or any other mechanism.

The District Court placed the aerial photographs under seal (Dist. Ct. Dkt. 15), and later held that EPA's actions constituted an unreasonable search in violation of the Fourth Amendment and exceeded its statutory inspection authority under the Clean Air Act (Pet. App. B-45). The Court of Appeals reversed on both issues, holding that the secured, developed Dow facility was an open field so no search occurred, and that aerial photography is not foreclosed as a site inspection technique under the Act (Pet. App. A-9, 14).

I.

THE DOW MIDLAND, MICHIGAN PLANT

Dow has been manufacturing chemicals at its Midland facility since the 1890's. For reasons of worker safety, economics, maintenance and industry custom, many of the chemical process plants within the Dow Midland facility are open-air plants (A. 59-60, 64-65, 71-72) Research, competition, and protection of its intellectual property such as patents, trade secrets and confidential business information, have always been an integral part of Dow's everyday existence (A. 15, 16, 62, 68).

Dow has thirty-seven (37) secured manufacturing locations in nineteen (19) states. Those locations encompass about two hundred and ten (210) separate manufacturing units, most of which are open-air plants. Dow has not installed "dummy" tanks, pipes, procees equipment, buildings, utility lines or roofs to confuse a photointerpreter (Kelyman Depo. pp. 55-62, 126-130, Dist. Ct. Dkt. 131). The costs would be prohibitive (Kelyman Depo. p. 56, Dist. Ct. Dkt. 56), and such a requirement

would be unreasonable and devoid of either common sense or common practice.

Even the government recognizes that ". . . for economic and engineering reasons it [Dow] has not taken any measures to prevent the aerial viewing and possible photographing of the plant" (Government Memorandum, p. 3, Dist. Ct. Dkt. 124).

To aid in the efficient trial preparation of this case, Dow requested and received approval to designate a representative plant, a brine chemicals plant, within its Midland facility so that discovery and proofs could be more manageable (Dist. Ct. Dkt. 79, 96 and 99). One reason that particular plant was designated is that it also appears on the enlargements made by EPA (A. 34, 37, 41-42; *see* Enlargements 2A-2F, 5A-5F and 10A-10F under seal per Dist. Ct. Dkt. 15).

The one representative plant discussed in this case covers thirty (30) acres* and although not deemed practical by the plant manager/engineer, would have cost at least $15,000,000 to roof in 1978. The practical problems of installing large bridge cranes with sufficient lift capability in the roof structure, or building the roof high enough to move a 100-125 foot high mobile crane underneath are overwhelming (A. 74-75).

Extensive security steps are taken to protect the Dow technology at the Midland facility. At the time of the EPA overflight Dow had a security contingent of approximately one hundred (100) people whose specific function and responsibility was site security. The 3.25 million dollars (1977 dollars) spent per year on the security for the 2,000 acre manufacturing facility to guard against

---

* *See* Photographs 1 and 2, Sealed Joint Appendix [The white ground cover is snow].

unauthorized entry or loss of any proprietary process technology includes:

- A chain-link fence at least 8 feet high installed completely around the production facility;
- gates for ingress and egress at various intervals in the fence have an attendant (guard) on duty when any given gate is in operation to admit or allow people to leave the facility;
- closed-circuit television surveillance for continuous monitoring of the various gates and the area along the fence surrounding the facility;
- alarm systems which will indicate unauthorized entry at various locations;
- motion detectors at strategic locations in the facility to indicate movement of personnel in certain restricted areas;
- roving patrols which travel throughout the facility and around the perimeter to augment the other security systems;
- liaison with local public law enforcement officials including radio communication to assist in the apprehension of persons engaged in unlawful activities relating to the production facility;
- a requirement that employees entering the facility must exhibit an identification badge in every instance of entry;
- a requirement that non-employees who wish to visit the facility must be approved and must obtain a visitors pass including a badge which must be exhibited at all times while in the facility;
- a requirement that non-employees who have been approved to visit be greatly restricted in their move-

ments and that some areas of the facility remain off-limits to all non-employees;

- a requirement that cameras by anyone other than an authorized representative of Dow are prohibited at all times and in all places in the facility;
- a requirement that persons visiting for technical reasons must obtain a technical pass which provides among other things that the visitor will not disclose any technical information learned as an incident to the visit;
- a staffing program such that security personnel are on duty twenty-four hours a day and seven days a week with at least twenty-five such people on duty at all times and with about fifty people on duty during normal work hours; and
- a policy that, in the event the engineering drawings and/or blueprints of a specific production plant are to be disposed of at the conclusion of construction, the drawings and/or blueprints would be packaged and incinerated under the direction of security personnel who would also witness the incineration (A. 55-57, 60, 65).

In addition to the above on-going security measures, during the creation of plants involving proprietary technology or design, Dow people handle all the research, design and engineering (A. 69). Such plants are designed by "absolute need to know" Dow employees using a process flow sheet written in code (A. 60-61, 73). The actual construction is done by contractors from piece-meal construction-type plans that do not disclose the overall process. The construction site is always fenced; there is always a 24-hour-a-day patrol and non-Dow cameras are never allowed (A. 16-20, 69-70, 72-74). In addition, all technical people, both Dow employees and contractors, sign secrecy agreements and are usually not completely

educated in an entire process (A. 17, 60-61, 74). The plant layout is designed in such a way that the more sensitive, proprietary technology areas are not visible from the public rights-of-way outside the fence (A. 60, 65, 70, 75). The general public's view of the facility from the ground outside the fence is the view that Dow chooses to show (A. 83).

Dow has a long-standing security procedure that prohibits the taking or releasing (outside of Dow) of photographs of the plant without specific Division Management review and approval (A. 13, 18, 20, 56, 66, 70). Absolutely no non-Dow cameras are allowed on plant property (A. 19-20, 73). The only photographs taken on-site are those taken by a Dow photographer after Major Manager authorization (A. 56, 61, 70).

As part of its overall security program, Dow has specifically instructed its security people to watch for and attempt to identify suspicious aircraft (multiple passes over the plant). Dow's concern about aerial photographs of its open-air facilities dates back to World War II (A. 13, 78; Kelyman Depo. pp. 26-27, Dist. Ct. Dkt. 131).

The written procedure for Reporting Planes Over The Plant, which was in effect at the time of the EPA overflight, included obtaining a description of any unidentified plane over the plant and then working with the Michigan State Police for follow-up* (A. 13-14, 79-81). That aerial security procedure was known to the people in the clockrooms and at the gates and to all Dow Security personnel, including captains, dispatchers, scouts, inspectors, and patrolmen (A. 13, 15). Additional information on the overflights of concern and Dow's liaison with the local

---

* Between February of 1973 and April of 1978, Dow's contact for information on plane registrations changed from the Michigan State Police to the Federal Aviation Administration and the local airports (Kelyman Depo. p. 98, Dist. Ct. Dkt. 131).

Federal Aviation Administration office and the local airports was distributed to Dow Security personnel shortly after the EPA overflight (A. 21-22).

If Dow discovers aerial photographs have been taken, Dow either develops and/or replaces the film, or reviews the photographs, or institutes litigation to protect its privacy and proprietary technology (A. 79-81).

II.

EPA's SEPTEMBER 1977 ON-SITE INSPECTION, REPETITIVE INSPECTION REQUEST, AND DETAILED AERIAL PHOTOGRAPHY

Prior to September 1977, EPA was conducting an investigation of Dow's two powerhouses (EPA Answer, ¶ 22, Dist. Ct. Dkt. 76). EPA stated that the September 9, 9, 1977, inspection was motivated by an impending enforcement action against Dow (A. 26). However, before making the September on-site inspection EPA felt it had enough information to proceed with its enforcement action without additional information from or about Dow (A. 27-28).

On September 9, 1977, with Dow's consent, EPA made a three-hour inspection of the Dow power plants (A. 23-26). EPA received the full cooperation of Dow, complete tours through both powerhouses, and all the information it requested to see or gather (A. 23, 26-27). Dow withheld nothing from EPA that EPA asked to inspect or see (A. 27).

After the inspection an EPA contractor, who was present at the inspection, requested additional documentation on the physical layout around each of the powerhouses and on the boilers and turbines within the powerhouses (A. 23-24). On September 21, 1977, Dow voluntarily provided the schematic drawings as requested

(A. 25; EPA Answer, ¶ 25, Dist. Ct. Dkt. 76). EPA received the schematics of the Dow powerhouses before the EPA aerial photography of the Dow Midland facility on February 7, 1978 (Beyer Depo. p. 31, Dist. Ct. Dkt. 30).

On December 1, 1977, EPA requested entry to Dow's Midland facility on December 5th to inspect and photograph the powerhouses and incinerator (A. 28-29). On December 2, 1977, Dow notified EPA that the proposed December 5th repetitive inspection was refused (A. 29), and discussed the possibility that EPA would seek a search warrant to gain entrance to Dow's facility (Pribila Affidavit, Exh. A to Dow's Motion For Partial Summary Judgment, Dist. Ct. Dkt. 120). EPA did not seek a search warrant (EPA Answers to Interrogatories No. 38, Dist. Ct. Dkt. 22).

After being refused admission for a repetitive inspection and the taking of ground photographs, EPA Region V requested aerial photographs of the Dow facility from the EPA's Environmental Monitoring And Support Laboratory (EMSL) in Las Vegas by letter dated February 3, 1978 (A. 32). EPA's request states that the photographs would be used as direct evidence in the impending enforcement action relating to the powerhouse emissions (A. 32).

On February 6, 1978, Abrams Aerial Survey of Lansing, Michigan, received an order for services from EMSL. Abrams was to take aerial photographs of the Dow Midland facility from various altitudes and perspectives as soon as business schedules and weather conditions would permit (A. 36, 39-41, 45-47).

Between 2 and 3 p.m. on February 7, 1978, Abrams Aerial Survey flew over (6 passes) and photographed the Dow Midland facility with a precision, floor-mounted certified aerial mapping camera in accordance with the instructions given by EPA (A. 39-46).

Abrams sent the undeveloped film to EMSL via commercial air baggage (A. 41, 46). Personnel at EPA's EMSL facility printed various sets of color contact prints and fifty color enlargements (A. 34, 37, 41-42; *see also* photographs under seal per Dist. Ct. Dkt. 15). EPA personnel with experience in photographic analysis, photographic enhancement, or photographic reconnaissance examined the photographs (A. 36, 44). Most of the prints were sent by commercial air freight from EMSL in Las Vegas to EPA Region V in Chicago, where enlargements were hung on an office wall and the remaining enlargements and prints were kept on a desk or table in one office, and the floor or heating duct of another office for a month (A. 37, 52, 53).

The scale of the aerial negatives taken by EPA from 1200 feet is 1:2400 (1 in. = 200 ft). Aerial negatives taken from a vertical perspective at approximately 1200 feet with the equipment and film utilized in this case can be enlarged to a scale of approximately 1 inch equals 20 feet or greater without significant loss of resolution (A. 46). Examination of the original aerial contact prints (unenlarged) under magnification reveals items as small as ½ inch in diameter (A. 53-54)*. Examination of the photographs enlarged to a scale of 1 inch equals 10 feet (Dist. Ct. Dkt. 171, Exhibits 4A-D and 5A-B – under seal; *see also* Photograph #5 in Sealed Joint Appendix) shows no significant loss of resolution.

EPA did not notify or in any other way involve the state or other federal agency in the photographing of Dow's plant (A. 35). Dow was not advised by EPA about

---

* The District Court (Pet. App. B-3) and the Court of Appeals (Pet. App. A-3) both note that items as small as ½ inch in diameter are discernible when the enlargements are viewed under magnification. That detail is also visible when the unenlarged, *original* contact prints are viewed under magnification.

the photographic mission either before or subsequent to its occurrence (Kee Depo. p. 51, Dist. Ct. Dkt. 28). The aerial photographs taken of the Dow Midland facility on February 7, 1978, by Abrams Aerial Survey are the only photographs taken, or procured, of the Dow facility by EPA (A. 33).

In the aerial photographs EPA captured not only Dow's 2,000 acre fenced manufacturing area, but also Dow's research and corporate office areas, other corporations' open-air structures and activities, and most of the city of Midland (*see* photographs under seal per Dist. Ct. Dkt. 15). The photographs depict minute items which are located in interior, non-public, regions of the open-air brine chemicals plant and which are surrounded by structures and equipment which make observation from anywhere but directly next to or directly above, a near physical impossibility (Wait Depo. (Sealed), Vol. III p. 97, Dist. Ct. Dkt. 152). The camera saw a great deal more than the human eye could ever see (Pet. App. B-27).

III.

LOWER COURTS' OPINIONS

Upon learning of the overflight and the taking of aerial photographs, Dow filed suit on March 15, 1978, alleging EPA's actions were unconstitutional and beyond its statutory authority (A. 1). Dow sought and received a temporary restraining order and a preliminary injunction which prohibited EPA from disseminating, releasing, copying or duplicating the photographs (or derivative information), taken of Dow's facility in Midland, Michigan (A. 2-4). Dow objects to the government's taking of any detailed, intrusive photographs of its facility from any perspective – aerial or otherwise. The fact that the photo-

graphs were exculpatory in that no powerhouse emissions were depicted (A. 31), does not alter Dow's objection.

The District Court granted Dow's Motion for Partial Summary Judgment on April 19, 1982, and found that EPA's actions of capturing the entire facility in vivid detail (to the point of discerning items ½ inch in size) after consent for an inspection had been refused and without judicial authorization was a violation of Dow's reasonable expectation of privacy and an unreasonable search in violation of the Fourth Amendment (Pet. App. B-32). The District Court also found that aerial photography is outside of EPA's inspection authority since the practice of aerial photography cannot comply with the plain language of Section 114(a)(2) of the Clean Air Act, which requires EPA to present credentials before entering to, upon or through a site to inspect records, check monitoring equipment, or take samples (Pet. App. B-44).

After the District Court's ruling on the cross-motions for partial summary judgment, Dow dismissed without prejudice its Fifth Amendment claim of taking of property without due process (Dist. Ct. Dkt. 219), and final judgment was entered. The government appealed.

On November 9, 1984, the Court of Appeals reversed the District Court's opinion. The Court of Appeals found that Dow's 2,000 acre secured commercial development was an open field from the air and hence there was no search (Pet. App. A-9). The Court also held that "[a]lthough the [Clean Air Act] does not expressly authorize enhanced aerial observation, the language of Section 114 clearly does not foreclose this technique" (Pet. App. A-14).

No petition for rehearing was filed. The Petition For Writ of Certiorari was filed February 7, 1985, and was granted June 10, 1985 (A. 94).

SUMMARY OF THE ARGUMENTS

I. and II.

EPA's intrusive aerial photographs infringe upon the personal and societal values protected by the Fourth Amendment. The Court of Appeals held that if EPA's action constituted a search, then *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), controls, and EPA's warrantless search violated Dow's Fourth Amendment rights (Pet. App. A-5). However, the Court of Appeals, relying on *Oliver* v. *United States*, 80 L.Ed.2d 214 (1984), found that Dow's secured facility was "like an open field" (Pet. App. A-9). Once Dow's developed and secured commercial structure was held to be an "open field," by definition no search occurred. *Hester* v. *United States*, 265 U.S. 57 (1924).

The Court of Appeals decision that Dow's secured, multi-million dollar industrial complex is an open field is novel, startling and absolutely unsupported in either fact or law. A secured, developed industrial facility is *not*, and has *never* been held to be, an "open field."

The decision misapplies the open fields doctrine as reaffirmed in *Oliver*. In doing so, the decision is clearly inconsistent with a long line of prior holdings of this Court that a commercial establishment is entitled to Fourth Amendment protection. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Marshall* v. *Barlow's Inc.*, *supra*; *Air Pollution Variance Board* v. *Western Alfalfa Corporation*, 416 U.S. 861 (1974); and *Oliver* v. *United States*, *supra*.

Dow's reasonable expectation of privacy is its expectation that the minute details of its outdoor manufacturing plants, detail which is *not* visible to the airborne eye and which Dow seeks to protect, will remain private. That expectation is legitimate and reasonable.

It is well established that intrusive government surveillance into a protected area or activity — such as a home or apartment, or a commercial structure, or a private conversation in a phone booth, is an unreasonable search. *Katz* v. *United States*, 389 U.S. 347 (1967); *United States* v. *Lace*, 669 F.2d 46 (2nd Cir. 1982), *cert. denied*, 459 U.S. 854; *United States* v. *Taborda*, 635 F.2d 131 (2nd Cir. 1980); *United States* v. *Kim*, 415 F.Supp. 1252 (D.Ha. 1976). In this case EPA used sophisticated aerial photography to capture and seize the details of Dow's commercial structures and activities which were not otherwise accessible from the ground and which were not visible to the human eye from an aerial perspective (Pet. App. B-27). The method or perspective of the government's constitutionally offensive scrutiny is of no great moment. Intrusive surveillance through a wire, through a horizontal window, or as in this case, through a vertical "window," are all patently unconstitutional.

The Court of Appeals destroys Dow's Fourth Amendment rights by characterizing the items, and equipment and activity Dow seeks to protect as "outdoor spaces between plant buildings" (Pet. App. A-4) and the intrusive, aided surveillance as mere "observation" (Pet. App. A-8). Dow seeks to protect the details and technology of its outdoor plants, *not* outdoor "spaces." The Court of Appeals disregards the fact that we are dealing with *open-air plants* comprised of a few "traditional buildings" integrally and inherently related to the larger, contiguous open-air manufacturing equipment (Photographs 1-5, Sealed Joint Appendix).

The decision attempts to conform to existing laws by recognizing that Dow does have a reasonable expectation of privacy from ground intrusion — that is, Dow's facility is not an open field at ground level (Pet. App. A-8). That finding and Dow's Fourth Amendment rights are then eviscerated by holding that Dow's facility is an

open field from the air (Pet. App. A-9). An area cannot be an open field from one perspective but not from another. Also, Fourth Amendment rights from a terrestrial intrusion are hollow if a more intrusive, and less particularized search method such as aerial photography is available at the sole discretion of government agents.

Dow's Fourth Amendment right to be free from unreasonable searches and seizures has been violated. Dow requests that the decision of the Court of Appeals be reversed.

III.

Without citation to legal authority and despite the plain language of Section 114(a) of the Clean Air Act [42 U.S.C. § 7414(a)], the Court of Appeals held that the statute does not foreclose EPA's use of aerial photography as a site inspection technique (Pet. App. A-14).

The holding is patently wrong since it both defies the plain meaning of the statutory language and ignores the fact that it is a physical impossibility for aerial photography to accomplish *any* of the prerequisites or purposes specified by the statute. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940); *Donovan* v. *Dewey*, 452 U.S. 594, 599 (1981).

Under the government's interpretation of Section 114, whereby any inspection technique that is not clearly foreclosed is fair game, surreptitious inspections could be conducted at any time and with any frequency as the Agency deems necessary. A statutory interpretation could scarcely be more broad, more susceptible to abuse of discretion, or more unreasonable.

Those charged with an investigative and prosecutorial duty should not be the sole judge of when to utilize constitutionally sensitive means in pursuing their tasks.

Almeida-Sanchez v. *United States*, 413 U.S. 266, 280 (1973). Official powers cannot be assumed or extended by administrative agencies beyond the terms and necessary implications of the statutory grant. They must be conferred by Congress. *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 649 (1931).

The EPA's use of aerial photography as a site inspection technique does not conform to the plain language of the Clean Air Act or to Congressional intent. The Agency exceeded its statutory grant of limited authority. Dow requests that the decision of the Court of Appeals be reversed.

ARGUMENTS

It is axiomatic that commercial and industrial establishments have a reasonable expectation of privacy and are entitled to Fourth Amendment protection in their non-public areas. *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978); *G.M. Leasing Corporation* v. *United States*, 429 U.S. 338, 353 (1977); *Air Pollution Variance Board* v. *Western Alfalfa Corporation*, 416 U.S. 861 (1974); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Katz* v. *United States*, 389 U.S. 347 (1967); and *Oliver* v. *United States*, 80 L.Ed.2d 214 (1984). The Court of Appeals' opinion is a radical departure from those cases.

The primary legal difference between the District Court Opinion (Pet. App. B), and the Court of Appeals Opinion (Pet. App. A), is that the District Court found that EPA's actions were a search and the Court of Appeals held they were not.

The Court of Appeals acknowledged that "If the government action in this case — EPA's aerial photography of Dow Chemical's Midland, Michigan plant —

constitutes a Fourth Amendment 'search', then *Barlow's* controls, and EPA's warrantless search violated Dow's Fourth Amendment rights" (Pet. App. A-5).

I.

EPA's INTRUSIVE AERIAL PHOTOGRAPHY WAS A SEARCH.

A. A Secured, Developed Industrial Facility Is Not An Open Field.

In *Hester* v. *United States*, 265 U.S. 57, 59 (1924), the Court held "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

Fourth Amendment protection extends to "the portions of commercial premises which are not open to the public." *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967). The businessman has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *See* v. *City of Seattle*, *supra* at 543; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

The "portions of commercial premises not open to the public" and "open fields" would seem to be mutually exclusive under the common understanding of those terms. Certainly both the facts and photographs* in this case clearly confirm that the Dow Midland facility is a secured, developed industrial facility and not an open field in either a legal or factual sense.

The rule of *Hester* that "an individual may not legitimately demand privacy for activities conducted out of

---

* *See* Photographs 1-5, in the Sealed Joint Appendix, and in the Record per Dist. Ct. Dkt. 15 and 171.

doors in fields, except in the area immediately surrounding the home" was reaffirmed in *Oliver* v. *United States*, 80 L.Ed.2d 214, 224 (1984). The *Oliver* decision did not affect the reasonable expectation of privacy of open-air industry in accord with *See*, *Barlow's* and *Katz*, which hold that secured, developed plant sites are enclaves which are free from arbitrary government interference. The Court in fact reconfirmed the reasonable expectation of privacy in the industrial setting. Discussing the traditional sanctity of the home, the Court noted that "The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment" (cites omitted). *Oliver*, 80 L.Ed.2d at 224, n. 8.

In discussing the distinction between open fields and the settings or types of activities where there is a societal interest in protecting privacy, the Court noted that open fields "usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be." *Oliver*, 80 L.Ed.2d at 224. The Dow manufacturing facility is a secured commercial structure to which the public and the police do not have general access.

Dow asserts that its open-air plants are commercial structures and subject to Fourth Amendment protection. Even if "structure" is defined to be "closed," various courts have recognized a business curtilage for areas entitled to Fourth Amendment protection because of proximity and relationship to a closed structure. *United States* v. *Swart*, 679 F.2d 698, 702 (7th Cir. 1982) [open-air business premises where cars held to be within the curtilage of business buildings]; and *Wattenburg* v. *United States*, 388 F.2d 853 (9th Cir. 1968). *See also, United States*

v. *FMC Corp.*, 428 F.Supp. 615, 618 (W.D.N.Y. 1977), *aff'd* 572 F.2d 902 (2nd Cir. 1978), where the District Court found that the highly restricted access to an industrial lagoon and the manner in which it was enclosed (8 ft. fence) did not permit application of the "open fields" exception.

The Court of Appeals found that "Dow had a kind of actual privacy expectation . . . to be free from ground level intrusions from the street" (Pet. App. A-8). However, the Court also held the Dow plant is "like an open field" as far as aerial observations are concerned (Pet. App. A-9). The Dow plant is not "like an open field."

It is contrary to common sense and public policy that an industrial facility could be deemed to be an open field from the sky, but not from the ground. An area is either an open field or it is not. It cannot logically be both. Having Fourth Amendment rights at ground level is meaningless if a more intrusive, non-particularized, surreptitious search method such as aerial photography is available without restriction upon government agents.

Until the Court of Appeals' decision, a secured and developed industrial facility had *never* been held to be an open field. The District Court specifically rejected the applicability of the open fields exception to this case (Pet. App. B-6, n. 5). Since *Hester* v. *United States*, 265 U.S. 57 (1924), the open fields doctrine has been generally applied to rural, agricultural land. "Field" has been interpreted well beyond its literal meaning to include wooded areas, deserts, vacant lots in cities, and open beaches, but *never* a developed, secured industrial complex. *See*, La Fave, Search and Seizure § 2.4 at 332 (1978). In those cases the land is "developed" only in an agricultural sense. The security and expectation of privacy question usually revolves around agricultural-type fencing and posting.

In *Oliver* v. *United States*, 80 L.Ed.2d at 225, n. 11, the Court noted that "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. . . . a thickly wooded area nonetheless may be an open field." The Court adds to the clarification in the same footnote "It is clear, however, that the term 'open fields' may include any *unoccupied or undeveloped area* outside of the curtilage" (emphasis added). Occupied and developed areas, such as the Dow manufacturing facility, are not open fields in a legal or factual sense.

In its opinion the Court of Appeals found that the District Court erred in dismissing the government's "open field" argument (Pet. App. A-9). In its limited citation to *Hester* v. *United States*, 265 U.S. 57 (1924) in the District Court (Dkt. No. 165, pp. 14-15) and in the Court of Appeals (Appellant's Brief, p. 12), the government used *Hester* and *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), to argue that observations* *from* public places (the sky) are constitutionally permissible. The government did not pointedly argue that the place its observations were directed *to*, that is, Dow's Midland facility, was an "open field." The Court's decision went far beyond both the government's position and the law.

If complex manufacturing facilities are deemed to be open fields in which the owners have no reasonable expectation of privacy with respect to visually enhanced intrusions, then companies such as Dow would have difficulty asserting that their technology discernible through such visually enhanced means has been maintained secret. Making reasonable efforts to maintain the

---

* The government consistently mischaracterized its detailed, intrusive surveillance photographs as mere "observations." The District Court found that ". . . the camera saw a great deal more than the human eye could ever see" (Pet. App. B-27).

secrecy of a trade secret is a condition precedent to alleging that information or technology in fact constitutes a protectable trade secret. *Kenawee Oil Company* v. *Bicron Corporation*, 416 U.S. 470, 476 (1974). Trade secrets require a context of privacy, or at least the possibility of privacy, for their existence. A threat to Dow's privacy threatens its very existence and integrity as a scientific, technological and research-based company.

Dow's expectation of privacy in the minute details in the heart of its open air plants is both deemed reasonable and supported by society and shared by others in similar circumstances. *See* pages 47-49 for a brief discussion of tort and criminal laws protecting trade secrets and privacy.

Other corporations, which unlike Dow were given notice of EPA's contemplated aerial photography of their plants, responsed with similar concern (A. 86-93). FMC Corporation responded in part that ". . . the standard inspection/right of entry provisions from the various water, air, hazardous waste, and toxic substances statutes . . . do not authorize the proposed surveillance and photographing" (A. 89). Monsanto objected to aerial photography of its facilities ". . . to protect valuable proprietary information, which would be disclosed by such aerial photography. In addition, such aerial photography would violate the prohibition against unreasonable searches . . ." (A. 92).

The wide-spread ramifications of holding that a multi-million dollar developed and secured industrial facility is an open field, and hence outside of the protection of the Fourth Amendment, is especially grim. Protection of industrial privacy and trade secrets from sophisticated surveillance into open-air operations is lost. The potential for abuse by the government is manifest. Searches will be indiscriminate with no judicial authorization, no restraint

on frequency, and no restraint on the nature or scope of the surveillance.

The Court of Appeals, in reversing the District Court, condoned the violation of Dow's right to be protected against unreasonable search and seizure as guaranteed by the Fourth Amendment, and granted the government *carte blanche* to conduct general searches contrary to existing constitutional restraints and legislative direction.

In view of this Court's decisions in *Katz* v. *United States*, *Marshall* v. *Barlow's Inc.*, *Air Pollution Variance Board* v. *Western Alfalfa*, and *Oliver* v. *United States*, the open fields doctrine was misapplied and Dow's reasonable, constitutionally justified, expectation of privacy was violated.

B. The Open Fields Doctrine Has No Application To Cases Where Sophisticated, Intrusive Surveillance Devices Are Employed.

The open fields doctrine must be limited both to the nature of the site inspected and to the unaided or unenhanced viewing application of *Hester* and *Oliver*. As Justice Brandeis cautioned in his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 473 (1928), and as the Court accepted in *Katz*, 389 U.S. 347 (1967), the Fourth Amendment must be capable of wider application than the mischief which gave it birth. Aided and enhanced government surveillance falls squarely within the scope of the Fourth Amendment; it does not transform the activity or object under surveillance into an open field.

Air Pollution Variance Board v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) holds that a government agent can go to areas where the public is not excluded and view whatever is exposed to the public. The public is not excluded from the sky. However, the "view exposed to the public"

must mean an unenhanced, "naked eye" view*. An intrusive view, just like the intrusive ear in *Berger* v. *New York*, 388 U.S. 41 (1967), and in *Katz*, is tortious or criminal per the public and unconstitutional for the government.

Citing to *Hester*, the Court in *United States* v. *Kim*, 415 F.Supp. 1252, 1256 (D.Ha. 1976) [telescopic observation into an apartment an unreasonable search], held that in light of the powerful technology used by the government, "the 'plain' in plain view must be interpreted as permitting only an unaided plain view." *See also, United States* v. *Lace*, 669 F.2d 46, 51, 55 (2nd Cir. 1982), *cert. den.* 459 U.S. 854, and *United States* v. *Taborda*, 635 F.2d 131, 139 (2nd Cir. 1980) [telescopic intrusions into homes unconstitutional].

The current law that any enhanced, intrusive viewing into a place where people have a reasonable expectation of privacy, such as the private portions of developed industrial property, is unconstitutional is correct and should not be overturned in this case. Technology exists and is being developed which can make a closed room an "open field." As the Court in *Kim, supra* at 1257, recognized ". . . as the technological capability of law enforcement agencies increases, the Fourth Amendment must likewise grow in response."

In a general discussion on the open fields exception, a former EPA assistant regional counsel posits:

> The recently filed Dow Chemical case against EPA . . . seems to involve a fact situation where

---

* *See also* Justice Rehnquist's concurring opinion in *Donovan* v. *Dewey*, 452 U.S. 594, 608-609 (1981), which states: "As far as I can tell, the stone quarry here was largely visible to the *naked eye* without entrance onto the company's property. . . . the Fourth Amendment is not extended to the open fields" (emphasis added). The open fields concept makes good sense and good policy only in the naked eye context (including minor visual aids such as glasses).

> the open fields exception may have some applicability. However, aerial surveillance would seem to push the exception too far.
>
> * * *
>
> The important question that has to be faced is what is constitutionally offensive scrutiny. It would be fallacious to extend the open fields exception to the facts in Dow because if it were, advanced technology has given us microphones and cameras that can make an enclosed room an "open field." Spatially based criteria of eligibility for fourth amendment protection ignore the pertinent question as to what it is we wish to see preserved from the offensive scrutiny.

Martin, *EPA and Administrative Inspections*, 7 Fla. St. L.R. 123, 134 n. 50 (1979).

The offensiveness of the scrutiny is apparent from the facts. After entry for a repetitive inspection was denied, and without seeking judicial oversight as required by Section 113 of the Act (42 U.S.C. § 7413), EPA embarked upon a targeted surveillance mission that produced aerial photographs capturing detail that is absolutely beyond the perception of the unaided human eye or mind (Pet. App. B-27).

Enforcement officers can observe (unaided) the perimeter or exterior or plainly visible aspects of a home, factory or apartment as much as they want. *Air Pollution Variance Board* v. *Western Alfalfa Corp., supra; Marshall* v. *Barlow's Inc., supra.* In fact, the EPA deployed a smoke reader to the Dow facility after the September 1977 inspection and before the February 1978 flyover (Smith Depo., Exh. 1, p. 2, Dist. Ct. Dkt. 29). However, when the government uses observation or detection aids to intrude in minute detail into the interior areas of a

protected place, that action is unconstitutional. *United States* v. *Taborda, supra,* 635 F.2d at 137; *United States* v. *Kim, supra; United States* v. *Lace, supra.*

As the Court in *Katz* v. *United States, supra,* 389 U.S. at 351, recognized: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Cite omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected".

Intrusive aids which overcome reasonable expectations of, or reasonable attempts to preserve, privacy cannot be sanctioned. They are repugnant to the Fourth Amendment.

C. EPA's Intrusion Infringed Upon The Personal And Societal Values Protected By The Fourth Amendment.

At the November 12, 1981, oral argument in the District Court on cross motions for summary judgment, the government admitted "All the Fourth Amendment cases involve a search for evidence. Of course that's what the government was doing, we don't deny that" (A. 94).

Apart from that admission, the facts of this case establish that EPA's deliberate, detailed examination of the Dow property by sophisticated aerial photography, which was calculated to produce evidence in an enforcement action that was concurrently referred to the Department of Justice (A. 31, 32), constituted a search.

The government's intent in making the observation or examination is a deciding factor. The fact that visual enhancement was employed, especially when it produced and "captured" images beyond the capabilities of the human senses for possible use as documentary evidence,

is a noncontrovertible indication that the agency engaged in a search.

> It has been noted by one commentator that the critical factor in deciding whether a search has occurred is the mental processes of the searcher. A functional observation occurs when the officer engages in a mental quest for evidence of crime and relies on his observation to assist in the quest. In this instance, the observation is a search.

Grange, *Visual Remote Sensing and Privacy Interests of the Fourth Amendment*, 1 Northrop U.L.J. of Aerospace, Energy & Environment 33, 51-52, n. 129 (1979).

In determining whether there was a search, the Court of Appeals focused on two queries: 1) whether EPA's aerial photography was sufficiently intrusive to constitute a search; and 2) whether the aerial photography intruded upon Dow's actual and reasonable expectation of privacy in the spaces between its buildings (Pet. App. A-5, 6). Relying on factual errors and a mischaracterization of Dow's expectation of privacy and overlooking the intrusion in this case (discussed at pages 32-33, 35-39), the Court of Appeals found that the Dow plant was "like an open field," and thus found a "non-search for Fourth Amendment purposes" (Pet. App. A-9).

The intrusion in this case is directly comparable to other methods of intrusive searches. For instance, in *United States* v. *Kim*, 415 F.Supp. 1252, 1256 (D.Ha. 1976), which involved a motion to suppress evidence derived from telescopic surveillance through the window of an apartment, the Court stated "It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a

search." Here, the EPA intruded into Dow's facility so far that items and equipment as small as ½ inch in diameter are depicted (A. 53-54). "It is of the utmost significance . . . that the sophisticated visual aids available to the government can intrude on individual privacy as severely as electronic surveillance in *Katz*, or the wire tapping in *Berger* v. *State of New York*, 388 U.S. 41 (1977)." *United States* v. *Kim*, *supra* at 1255-56.

In *United States* v. *Taborda*, 491 F.Supp. 50, 53 (E.D. N.Y. 1980), the Court cited *Katz* in suppressing evidence obtained by means of a high-powered telescope aimed through the window of a home, stating:

> This court reads the *Katz* case to mean, as a minimum, that the people may demand privacy unless a policeman can see or hear them from a place accessible to those members of the public not preternaturally inquisitive. . . . the court [*Katz*] must have meant by "public" the ordinary run of people, not those who happen to possess powerful and sophisticated devices and curiosity to use them to spy on their fellows.

In affirming that opinion, the Second Circuit held that to the extent that agents used a telescope to identify objects or activities that could not be identified without it, those observations were searches. *United States* v. *Taborda*, 635 F.2d 131, 139 (2nd Cir. 1980). In this case the camera saw a great deal more than the human eye could see (Pet. App. B-27).

> Most people would regard [video surveillance], standing alone, as even more intrusive than interception of oral communications, which is subject to the strictures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. 2510 *et seq.*].

In the Matter of An Application Of the United States for an Order Authorizing Interception Of Oral Communications And Video-Tape Surveillance, 513 F.Supp. 421, 423 (1980).

Aerial visual surveillance is no exception since the reasonable expectation of privacy is not earthbound. In finding that the owner of a ¾ acre marijuana patch had no reasonable expectation of immunity from overflight, the Court in *Dean* v. *Superior Court*, 35 C.A.3d 112, 116, 110 Cal. Rptr. 585 (1973), stated: "The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion."

Noting that a prime measure of the reasonableness of expectation of privacy is mankind's common habits in the use of domestic and business property, the *Dean* Court posits:

> One who builds a swimming pool and sunbathing area in his backyard expects privacy (hence immunity) from aerial inspection. Areas reasonably used in ordinary business operations are assumedly entitled to similar immunity. Such areas are expectedly private according to the common habits of mankind.

35 C.A.3d at 117.

Dow believes that those and similar decisions reflect both the public's expectations and sound Fourth Amendment analysis.

As applied to this case, the EPA's intentional discernment and capturing of minute details of Dow's outdoor commercial structures and activities which were *not visible without optical aid*, was clearly a search. The government's intrusion infringed upon the personal and societal values protected by the Fourth Amendment.

II.

THE INTRUSIVE AERIAL PHOTOGRAPHY VIOLATED DOW'S ACTUAL AND REASONABLE EXPECTATION OF PRIVACY.

The Court of Appeals did find that Dow had an expectation of privacy at ground level:

> Here Dow had an actual expectation of privacy in certain parts of its plant, privacy which included the freedom from certain kinds of intrusion. Dow took great pains to be free from ground level intrusion by building a perimeter security fence and employing security guards. 536 F. Supp. at 1364-65. Hence, Dow had a kind of actual privacy expectation in these parts of its plant, a privacy interest to be free from ground level intrusions from the street.

(Pet. App. A-8).

Despite its finding of a reasonable expectation of privacy at ground level, the Court of Appeals abandoned consistency and found that Dow had no reasonable expectation of privacy from the air. To reach this remarkable conclusion, the Court ignored the distinction between mere aerial observation and detailed aerial photography, held that EPA's admitted search was not a search at all, held that Dow's security measures to protect against aerial photography were nonexistent, found that the Dow facility was on an airport flight pattern despite no support in the record, and held the secured, developed industrial complex to be an open field from the air.

> The reasonableness of a search is . . . [to be determined] by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth

> Amendment and in opinions of this Court applying that Amendment.

Ker v. *State of California*, 374 U.S. 23, 33 (1963). The District Court understood the facts and circumstances of the case and found a search. The Court of Appeals misapprehended a number of material facts and circumstances in reaching its decision that there was no search. Those outcome determinative factual errors and omissions are discussed below.

A. Dow's Reasonable Expectation Of Privacy

In support of its opinion that Dow had no expectation of privacy from aerial observation, the Court of Appeals found that "Dow did not take any precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off" (Pet. App. A-8).

Dow does take precautions against aerial intrusion. As described at pages 9-10, since World War II it has been a specific job responsibility of Dow Security people to watch for, report and follow up on suspicious aircraft over the plant (A. 13-14, 21-22; Kelyman Depo. p. 26, Dist. Ct. Dkt. 131).

The finding that the plant is near an airport and within take-off or landing patterns, is not supported in the record and appears to be an extension of Dow's acknowledgement that planes (undefined number and frequency) fly over its Midland facility (A. 76-77). Planes criss-cross this nation every day; most create no cause for concern. However, assuming for the sake of issue resolution that the finding is correct, it neither aids nor detracts from Fourth Amendment analysis. The location, and the size, of the place being searched is not an element of Fourth Amendment analysis. The "location"

theory of *Olmstead* v. *United States*, 277 U.S. 438 (1928) was overruled in *Katz* v. *United States*, 389 U.S. 347 (1967), which holds that the Fourth Amendment protects people, not places.

If being "near" an airport is sufficient to strip a person of an otherwise reasonable expectation of privacy, then millions of homes and businesses in this country would suddenly be deprived of Fourth Amendment protection*. Population centers, including residential and commercial properties, and airports tend to be found near one another.

Although the Court of Appeals does recognize that "[c]ertainly, no one could reasonably expect Dow to build a dome over its entire Midland plant . . .", the Court posits that "Dow could have shielded the critical spaces in between its buildings, if it had an actual expectation of privacy from aerial observation of these regions" (Pet. App. A-8). Dow's expectation of privacy is in the minute details in the non-public, internal portions of its open-air facilities from visually enhanced surveillance, *not* in "spaces in between its buildings" or from mere "observations." The small size and detail of items and equipment of concern to Dow is not visible from a distant, moving unaided aerial view. To suggest that Dow must shield minute detail, detected during a government quest for evidence with a certified mapping camera, to preserve its privacy is the antithesis of the Fourth Amendment.

In addition to annihilating the Fourth Amendment protection for open air industry, the Court of Appeals

---

* Using the proximity of an airport and the passage of "other" aircraft as a factor in assessing the reasonableness of an expectation of privacy is also misplaced since the Fourth Amendment protects against governmental, not private, intrusions. *Katz* v. *United States*, 389 U.S. 347, 352 (1967).

decision wreaks havoc on protection for the home and its attendant curtilage. Due to the nature of aerial photography, where the camera is switched on and the run is made, the area depicted (searched) cannot be described with any sense of particularity before the fact. In this case not only was Dow's entire 2,000 acre facility photographed (the "targets" were the two powerhouses and the incinerator), but other commercial properties and homes in Midland were also captured on the detailed photographs. What protective measures should a homeowner take to protect the privacy in a fenced yard against aerial surveillance?* None. It is unreasonable to require citizens, be they individuals or corporations, to take steps to protect their privacy from illegal surveillance by the government when the government is doing something it ought not do.

If an individual or a corporation has a legitimate expectation of privacy in a place, such as a home or a commercial structure, constitutional protection against unwanted entry or surveillance is not forfeited if he fails to take some action to *totally* secure the place. The unlocked front door, the undrawn shade, and the uncovered open-air plant are indicia of our free society and *not* invitations for government surveillance. The protections of the Fourth Amendment are not forfeited by lack of a perfect security system. It would be unreasonable to force citizens to additionally protect what the constitution already protects.

The expectation of privacy only has to be reasonable, not total. The law protects the reasonable expectation of privacy, not the perfect security system. The perfect security system has no need for protection. If achievement

---

* An explanation that the homeowner was not the target is akin to telling the wounded innocent that the government was actually shooting at a fleeing subject.

rather than expectation of privacy were the only thing protected by the Fourth Amendment, then that Amendment would be a nullity.

B. Mischaracterization Of "Interior Regions Of The Plant" And "Mere Aerial Observation"

"Interior regions of the plant" are the structures both inside of and not visible from the fenceline — *not* outdoor spaces between plant buildings. The District Court noted that it had carefully examined all the photographs and was struck by their vivid detail and resolution (Pet. App. B-3). The Court found that "Many of these minute, but observable items are located in *interior* regions of the plant which are surrounded by buildings and other structures which make observations from anywhere but *directly above*, a near physical impossibility" (Emphasis in the original) (Pet. App. B-3). The District Court also found that "The photographs depict *internal* regions of the plant in such vivid detail, capable of further enlargement and magnification, as to defy simply being described as views of the *exterior* of the facility" (Emphasis in the original) (Pet. App. B-22). "[T]he camera saw a great deal more than the [unaided aerial] human eye could ever see" (Pet. App. B-27).

Despite both the District Court's factual findings and its own opportunity to view the photographs, the Court of Appeals without explanation redefined the phrase "interior regions of the plant" to mean "the open, outdoor spaces between plant buildings" (Pet. App. A-4). That characterization completely misses the mark and is not supported in the record. Yet it is repeated many times in the opinion (Pet. App. A-6, 8, 9, 10, 11, 12 and 13), and Dow believes, is a major factor in the reversal of the District Court decision.

The Court of Appeals' characterization of Dow's expectation of privacy as referencing the "spaces between its buildings" both supplies its own answer concerning reasonableness and makes Dow's position appear ridiculous. Dow is not trying to protect *space* between its buildings; rather, Dow is trying to protect the details of its open-air commercial structures which are located inside its secured fenceline (A. 62, 68).

The Court of Appeals disregarded the complex mass of pipes, vessels and equipment which comprise Dow's outdoor manufacturing areas which are neither buildings nor open spaces between buildings. Those multi-million dollar outdoor plants are the basis of Dow's business, its competitive edge, and the technological fruits of its inventors and engineers. They are protected by Dow's multi-million dollar security system and our legal system.

The Court of Appeals found that "Dow's reasonable privacy interest in the interior of its buildings does not extend into the areas between the buildings because, unlike the home setting [curtilage], there is no compelling reason in terms of privacy to justify this extension" (Pet. App. A-12). That finding ignores the integral and inherently related functions of the covered buildings, *e.g.* a control room, and the contiguous and connected pipes, vessels and equipment which comprise the operating plant. The buildings and the contiguous, open-air process areas are as interrelated as the human mind and body. They are mutually dependent and interrelated.

A review of the EPA aerial photographs (Photographs 1 and 2 — Sealed Joint Appendix; *see also* photographs in the Record per Dist. Ct. Dkt. 15), clearly shows that the representative brine chemical plant is not comprised of buildings and open spaces between buildings, as perceived by the Court of Appeals. Rather, the 30 acre plant (A. 74) is comprised of only two "traditional"

buildings with no discernible "open space" between them and the rest of the commercial structure, that is, the web of pipe, tanks, vessels, utilities, and technical process equipment that comprise the brine chemicals plant (Photographs 1, 2 and 4 – Sealed Joint Appendix). Some of the trade secret aspects of the plant that are visible on the photographs were discussed during deposition (Wait Depo., Vol. 1, pp. 112, 115-118, 122, 126, 131, 135-137, Dist. Ct. Dkt. 152 – under seal; Wiseman Depo. pp. 43-46, 60-65, 67-68, 70, Dist. Ct. Dkt. 255 – under seal). The photographs reveal trade secrets and technology that is unique to Dow (*e.g.*, Wiseman Depo. pp. 43, 44-46, 67, 70, Dist. Ct. Dkt. 255 – under seal).

Throughout its decision the Court of Appeals characterizes EPA's surveillance and detailed aerial photography as "aerial observation" and the "area observed" (Pet. App. A-8, 9). That characterization of casualness belies the facts in the case at bar. It also reveals a major misapprehension of the central contention of the Dow case.

Mere aerial observation (naked-eye) is akin to a government agent watching a house from a public park, or an EPA smoke reader observing a plume from a public right-of-way. *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U.S. 861 (1974). Sophisticated aerial photography, which perceives and captures detail which is inaccessible to the unaided human eye or mind, is analogous to using a telescope or telephoto lens to peer into a structure to a degree where the details of human activity are visible. *Cf.*, *United States* v. *Kim*, 415 F.Supp. 1252 (D.Ha. 1976) [government use of telescope enabling agents to determine reading material of suspect through an apartment window is an unreasonable search], and *United States* v. *Taborda*, 635 F.2d 131 (2nd Cir. 1980) [enhanced viewing through a window into interior of a home with a high-powered telescope unlawful].

As a public policy and common sense matter, the location of the "window," that is, to the street or to the sky, does not matter. Once the human relations that create the need for privacy are established, the reasonable expectation of privacy is recognized and protected.

Since the inception of air flight, Dow has known that its plants are visible by people in aircraft. In fact, in the November 27, 1973, Dow Security directive on reporting planes over the plant it is clearly stated that "Management is very much concerned when other than commercial passenger flights pass over the plant property" (A. 14). Why no concern about commercial passenger flights? Because the view from a commercial plane is similar to that depicted in Photograph 3 in the Sealed Joint Appendix (Dist. Ct. Dkt. 168, Exhibit 7), which causes Dow no consternation. Other reasons include: commercial planes do not make multiple passes over the plant; commercial planes are not equipped with floor-mounted certified mapping cameras; and even if a passenger on a commercial flight went beyond mere aerial observation to aided photographic observation, between the oblique angle of vision and the multi-layer plastic airline window, the photograph would be similar to Photograph 3 in the Sealed Joint Appendix.

Other than both being photographs, there is no comparison between the resolution and detail of the EPA photographs and the typical "aerial observer" photograph (*cf.* Photographs 1 and 2 *versus* 3 in Sealed Joint Appendix), or the aerial photographs typically taken by the Michigan Department of Natural Resources (DNR) (Dist. Ct. Dkt. 167; A. 54), or other state or federal agencies. The contact scale of the EPA photographs is 1:2400 (1 in. equals 200 feet); the scale of a typical Michigan DNR photograph, such as the one used by EPA in the District Court (Dkt. 167), is 1:24,000 (1 in. equals 2,000

feet) (A. 54). The degree of detail depicted at a scale of 1:24,000 does not cause Dow concern.

The phrases "aerial observation" and "area observed" imply an unaided human eye. Dow would have no quarrel if the "area observed" was its 2,000 acre manufacturing plant or large parts thereof. But, it is materially inaccurate to characterize the capturing of every square inch on 2,000 acres of developed industrial property as the "area observed." It is neither area, which implies large size, nor observed. It is the scrutiny of minute detail not humanly possible without the use of sophisticated technology.

The EPA aerial reconnaissance photographs, which depict the inner workings of the open-air manufacturing plants within the fenced and secured Midland facility, are the product of extremely intrusive, aided and constitutionally offensive scrutiny. The photographs are the functional equivalent of technical process drawings and blueprints revealing the details of Dow technology (A. 61-62, 68) — the very heart of Dow's business.* EPA searched the interior regions of the Dow facility — areas where the public and government agents have no right to be. EPA "saw" the minute details of interior portions of the plant not merely by means of the aerial perspective, but through the aid of sophisticated visual enhancement and capture via aerial photographs.

C. The Search Was Unreasonable.

A fundamental purpose of the Fourth Amendment is to safeguard people from arbitrary government invasions of

---

* The various perspectives offered by the photographs are in some respects better than two dimensional blueprints. The photographs show depth. Compare tanks and equipment depicted in Photographs 1 and 2, and also 4 and 5 in the Sealed Joint Appendix. *See also* Wiseman Depo. pp. 40-41, 60, Dist. Ct. Dkt. 255 – under seal.

legitimate privacy interests, and not simply those interests found inside four walls and under a roof. *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949); and *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

This Court has strictly construed any proposed abrogations of the privacy interest protected by the Fourth Amendment. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (footnote omitted). *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971). The government bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *Coolidge*, 403 U.S. at 455.

The Court of Appeals stated that if the open fields exception does not apply, then the EPA's activity was an unreasonable search (Pet. App. A-5). Dow asserts that the open fields exception does not apply and that the search was unreasonable since, under the facts and reasoning stated above, Dow's reasonable expectation of privacy in the details of its secured commercial structures was violated by the government's calculated, intrusive surveillance.

Donovan v. *Dewey*, 452 U.S. 594 (1981), addresses the relationship between the Fourth Amendment and a specifically tailored and pervasively regulating statute and thus is not directly on point. However, *Dewey* does state that "Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for furtherance of federal interests." *Donovan* v. *Dewey*, *supra* at 599.

The aerial photography at issue was not authorized by law. *See* Dow's argument at pp. 41-49. Nor was the surreptitious aerial photography necessary to further federal interests. The purpose of the mission was to obtain documentary evidence of "excessive visible emissions" (A. 32). The photographs showed no plume (A. 31). In addition, without significant cost to the Agency and giving Dow full opportunity to protect its trade secrets, the Administrator could have requested, indeed required, Dow to ". . . provide such other information as he [EPA] may reasonably require." Section 114(a)(1), reprinted on p. 3.

Judged by a comparison of the severe intrusion on Dow's Fourth Amendment interests against the complete lack of promotion of legitimate governmental interests, the search in the case at bar is clearly unreasonable. *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979).

"Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply" (cite omitted). *Donovan* v. *Dewey*, 452 U.S. 594, 599 (1981). Dow's Fourth Amendment right to be free from unreasonable search and seizure has been violated.

III.

SECTION 114(a) OF THE CLEAN AIR ACT DOES NOT AUTHORIZE, EITHER EXPLICITLY OR BY LACK OF PROHIBITION, THE USE OF AERIAL PHOTOGRAPHY AS A SITE INSPECTION TECHNIQUE.

The legislative grant of authority with respect to EPA's inspection function under the Clean Air Act is contained in Section 114(a), which is reprinted on pages 2-3.

The legislative enforcement/inspection scheme established by Congress in Section 114 of the Act consists primarily of self-reporting by owners and operators of permitted facilities and on-site inspections. Owners and operators are required by law to keep accurate emission reports. Those reports are then reviewed within the Agency to determine whether there has been a violation of the regulations (Beyer Depo. pp. 16-17, Dist. Ct. Dkt. 30).

EPA's on-site inspection authority is not *carte blanche*. In Section 114 Congress has specifically defined EPA's investigatory functions and powers with respect to Agency requests for information (Section 114(a)(1)), and inspections, monitoring, and entry (Section 114(a)(2)). Congress authorized EPA to conduct site inspections of the various regulated establishments as part of an overview and evaluation of the states' performance in implementing the Clean Air Act. Although the Act establishes a dual state-federal system of air pollution enforcement, the states have primary responsibility for enforcement of the national ambient air quality standards. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 81 L.Ed.2d 694, 704-705 (1984).

A. The Decision Is Inconsistent With Both The Plain Meaning Of The Statutory Language And Congressional Intent.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we

have followed their plain meaning." *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) (footnote omitted); *see also, United States* v. *Oregon*, 366 U.S. 643, 648 (1961). The statute does not contemplate or authorize the use of aerial photography as a site inspection technique. The Court of Appeals erred in finding that the "language of Section 114 clearly does not foreclose this technique" (Pet. App. A-14).

Once the agency decides to inspect a facility the Administrator is both authorized and bound by Section 114(a). The EPA is required to present credentials before the inspection. The Administrator's inspection/entry authority is clearly limited to *entry to, upon, or through any premises*. Once on the premises, the inspector's authority and purpose is limited by Section 114 to: 1) the inspection of monitoring equipment or methods which are required under the Act; 2) the sampling of effluents which the owner or operator of the facility is required to sample under the Act; and 3) the examination of records which are required to be kept under the Act. It is physically impossible for the EPA to carry out any of the investigative purposes or functions, as defined or reasonably implied by statute, by use of overflights and aerial photography. The incongruity of the plain language of the authorizing statute and the use of aerial photography as a site inspection technique is depicted in the following diagram:

STATUTORY REQUIREMENTS CAA 114(a)(2)	STATUTORY REQUIREMENTS MET BY SURREPTITIOUS AERIAL PHOTOGRAPHY	
	Yes	No
(2) The Administrator . . . upon presentation of his credentials –		☑
(A) shall have a right of entry to, upon, or through any premises of such person . . . , and		☑
(B) may at reasonable times have access to and copy any records,		☑
inspect any monitoring equipment . . . , and		☑
sample any emissions which such person is required to sample . . .		☑

The physical impossibility of aerial photography to conform to the statutory prerequisites and purposes delineated by Congress in Subsection 114(a) clearly establishes not only that aerial photography is not expressly authorized, but also that the language of the statute actually forecloses the technique. Congress did not intend that the agency use remote surveillance as a method of site inspection.

The Court of Appeals' decision that the language of Section 114 does not foreclose the use of aerial photography as an on-site inspection technique is contrary to the plain meaning of the statutory language. *Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It is also contrary to what little legislative history there is on the topic. In discussing EPA's inspection authority under Section 308 of the Clean Water Act [33 U.S.C. 1308], which is in *pari materia* with the inspection authority under the Clean Air Act, Congress stated: "As under the Clean Air Act, the Committee expects the authority to enter will be used judiciously and upon any challenge to entry the Committee expects the Administrator to obtain the necessary warrant." S. Rep. No. 92-414, 92nd Cong., 2nd Session, *U.S. Code Cong. & Ad. News* 3668, 3729. "Enter" and "challenge to entry" are subject to only one interpretation: Congress intended that inspections be conducted in a face-to-face, nonsurreptitious manner.

Congress has addressed the precise question at issue; that is, the manner and purposes of a site inspection under the Clean Air Act. Section 114(a)(2). Congress' unambiguously expressed intent must be given effect. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 81 L.Ed.2d 694, 703 (1984). "If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 649 (1931).

B. The Court Of Appeals Cites No Legal Authority For Its Holding That The Language Of The Act Does Not Foreclose Use Of Aerial Photography As An Investigation Technique.

The District Court properly held that "Aerial surveillance and photography is not authorized, either expressly or impliedly, by Section 114 of the Clean Air Act" (Pet. App. B-44). The Court of Appeals agreed that "the statute does not expressly authorize enhanced aerial observation . . ." (Pet. App. A-14). However, some misplaced analogies were employed by the Court of Appeals to hold that ". . . the language of Section 114 clearly does not foreclose this technique" (Pet. App. A-14). Absolutely no legal authority was cited in the Opinion to support the reversal.

The analogies proffered by the Court of Appeals are inappropriate both factually and legally. First cited are non-site information-gathering techniques such as library research, employee interviews (presumably off-site) and off-site observations of the plant. These examples are not supportive of the holding since they do not entail observing on-site, internal details of an industrial facility.

Next is a comparison with "other law enforcement officers who use aerial observation in their work" (Pet. App. A-14)*. The vague, nonspecific assertion of the Court of Appeals that other enforcement officers use aerial observation without presenting credentials in advance completely disregards the fact that in Section 114(a) Congress has *specifically required EPA to present credentials* before making an inspection, and to accomplish specific purposes while inspecting.

Even if the EPA is denoted a law enforcement agency rather than an administrative agency, law enforcement

---

* As stated above, mere aerial observation is not at issue; detailed, enhanced and memorialized aerial surveillance is.

agencies are bound by the Constitution and statutes which authorize and limit their activities. The government's assertion that all inspection techniques not specifically precluded by the Act are permissible runs afoul both of the clear statutory language and purpose, and of existing law. There is a close analogy between intrusive audio surveillance and intrusive optical surveillance. Both can be conducted surreptitiously. Extra-judicial wiretapping by government agents is illegal. *Berger* v. *New York*, 388 U.S. 41 (1967). *See*, Omnibus Crime Control And Safe Streets Act, 18 U.S.C. §2510 *et seq*. The EPA cannot employ wiretaps even though Congress did not forbid use of the technique in Section 114. The same is true of other constitutionally offensive scrutiny, such as intrusive aerial photography, which Congress did not specifically list as forbidden.

Other administrative agencies, such as OSHA, have regulations that add definition to the agency's statutory inspection authority. 29 C.F.R. § 1903 *et seq*. EPA has no comparable regulations guiding the discretion of its inspectors as to which establishments to inspect or what procedure to follow when entry is refused.*

The Court of Appeals' analogy to military investigators is especially inappropriate (Pet. App. A-14). Not only does the military operate under a different system of justice, but it is expressly prohibited from aiding in civilian law enforcement. 18 U.S.C. § 1385. Also, unlike the EPA, the military generally keeps its files from public scrutiny.

---

* EPA does have an internal policy which states that *"Barlow's* clearly establishes that the owner does have the right to ask for a warrant under normal circumstances." EPA MEMORANDUM ON INSPECTION PROCEDURES, 41 Envir. Rptr. (BNA) 2451, 2452 (April 11, 1979); also at Dist. Ct. Dkt. 166.

C. The Decision Is Inconsistent With The Clean Air Act's Provision Protecting Trade Secrets And With Existing Tort And Criminal Law.

The decision of the Court of Appeals annihilates the protection for trade secrets offered by the Clean Air Act. Section 114(c) [42 U.S.C. § 7414(c)] and 40 C.F.R. § 2.201 *et seq.* provide that an owner or operator may designate information as confidential business information when the Agency acquires the sensitive information. The Agency's use of aerial photography abrogates any possible trade secret protection since the person photographed has no notice of the Agency's acquisition of the photographs and no opportunity to claim that the photographs contain confidential business information.

The decision is also counter to the criminal law on theft of trade secrets and the law of torts on misappropriation of trade secrets. The Restatement of Torts § 757 (1939) (Pet. App. C), is the basis of trade secret definition and protection. As recognized by this Court, "The law also protects the holder of a trade secret against any disclosure or use when the knowledge is gained, not by the owner's volition, but by some 'improper means,' Restatement of Torts § 757(a), which may include theft, wiretapping, or even aerial reconnaissance." *Kewanee Oil Company* v. *Bicron Corporation*, 416 U.S. 470, 475-476 (1974) (footnote omitted).

DuPont v. *Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. den.* 400 U.S. 1024 (1971), cites the Restatement of Torts § 757 and discusses the tortious taking of trade secrets from a plant under construction by means of aerial photographs. In that torts context, the Court discusses public policy and a legal norm equally applicable here:

> We should not require a person or corporation to take unreasonable precautions to prevent another

> from doing that which he ought not do in the first place. Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement, and we are not disposed to burden industrial inventors with such a duty in order to protect the fruits of their efforts.

DuPont v. *Christopher, supra* at 1017.

The Uniform Trade Secrets Act (Pet. App. D), which was approved by the National Conference of Commissioners on Uniform State Laws in 1979, and which has been adopted by at least seven (7) states, is an appropriate index of society's values as reflected by the law. In part, a trade secret under the Uniform Act (§ 1(4)) must not be readily ascertainable by proper means, and subject to efforts that are reasonable under the circumstances to maintain its secrecy. The Dow trade secrets in its Midland facility are subject to reasonable security to maintain their secrecy and are *not* readily ascertainable by *proper* means. If the Court of Appeals' decision is allowed to stand, and the government is allowed to capture trade secrets by improper means, Dow's ability to reasonably protect its trade secrets will be placed in serious jeopardy.

Although Michigan has not yet adopted the Uniform Trade Secrets Act, Michigan Compiled Laws (M.C.L.) § 752.772 (Pet. App. E), makes it a crime to steal a trade secret. Photographs are explicitly recognized in M.C.L. § 752.771 (Pet. App. E), as one means of stealing trade secrets. It is also illegal to invade one's privacy by means of surveillance in Michigan. M.C.L. § 750.539a and d (Pet. App. E).

The intent of Congress and the statutory language are both clear. EPA's limited site inspection authority does not include aerial photography. The Court of Appeals cites neither legal authority nor compelling analogy in revers-

ing the District Court and holding that the Act does not foreclose aerial photography as a site inspection technique.

CONCLUSION

Dow does not dispute EPA's right, at reasonable times, to enter Dow property to inspect Dow's records or equipment required to be kept or maintained under the Act, or to sample emissions. In fact, in most instances Dow and EPA have developed excellent working relationships.

Dow is not interested in hindering EPA's valid inspection or enforcement efforts. But those inspection and enforcement efforts must be conducted both within the statutory authority granted by Congress and the Constitutional strictures against unreasonable searches and seizures. Intrusive, detailed aerial photography is not a valid inspection method. The laudable objectives of the Clean Air Act can be realized under procedures which pay due regard to the Fourth Amendment. Valid constitutional claims must be vindicated or the population as a whole suffers.

In the historic dissent in *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928), Justice Brandeis cautioned:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

As stated in a general discussion on privacy in the context of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965):

> Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

Emerson, NINE JUSTICES IN SEARCH OF A DOCTRINE, 64 Mich. L.R. 219, 229 (1965).

Privacy may generally be defined as the control we have over knowledge or information about ourselves. Surreptitious data collection by the government of the details of a person's activities entails a complete lack of control over the information and constitutes an invasion of privacy. To be deprived of control over what we do and who we are is the ultimate assault on liberty. Fried, PRIVACY, 77 Yale L.J. 475, 482-485 (1968).

For the reasons stated above, the Opinion of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

By: JANE M. GOOTEE, Esq.
Counsel of Record

JAMES H. HANES, Esq.
BERND W. SANDT, Esq.
The Dow Chemical Company
1111 Washington Street
Midland, Michigan 48674
(517) 636-2663

Counsel for Petitioner

Dated: July 25, 1985